IN THE MATTER OF the Human Rights Code, 1981, c.53, as amended;

AND IN THE MATTER OF the complaint of Jane Carere dated July 15, 1985 alleging discrimination with respect to employment on the basis of sex, harassment and sexual solicitation by Family & Children's Services of Guelph & Wellington County, J. Alex Macrae and James Morgan;

AND IN THE MATTER OF the complaint of Jane Carere dated March 26, 1987 alleging discrimination with respect to employment on the basis of reprisal by Family & Children's Services of Guelph and Wellington County, Alex Macrae, James Morgan, Dan Sibley and Ranj Feduc.

Board of Inquiry: Morley R. Gorsky

Appearances:

For the Commission: Ms. Geri Sanson,
Counsel and Wenda Woodman Student at Law
Legal Services
Ontario Human Rights Commission

For the Complainant: Ms. Jane Carere, on her own behalf

For the Respondent: Ms. Carolyn Kay-Aggio,
Counsel
Hicks Morley Hamilton Stewart Storie
Barristers and Solocitors

I N T E R I M D E C I S I O N

On April 30, 1992, the Ontario Minister of Citizenship appointed me to chair a Board of Inquiry pursuant to subsection 38(1) of the Human Rights Code, S.O. 1981, c. 53 as amended. The Board was instructed to hear the matter of the complaints of Jane Carere, dated July 15, 1985 and March 26. 1987 alleging, respectively, discrimination in employment on the basis of sex, sexual solicitation, harassment by Family & Children's Services of Guelph & Wellington County, J. Alex MacRae and James Morgan, and discrimination with respect to employment on the basis of reprisal by Family & Cchildren's Services of Guelph and Wellington County, Alex Macrae, James Morgan, Dan Sibley and Ranj Feduc. The hearing commenced by conference call on Friday, May 15, 1992, at 8:30 a.m.

During the course of the conference call, Ms. Kay-Aggio, counsel for the Respondents, indicated that she wished to have the venue for the Board of Inquiry moved to Kitchener from Guelp. Neither the Complainant nor counsel for the Commission was agreeable to that request and it was agreed that written submissions on this issue would be made to me. Counsel for the Respondents filed her written submissions on June 10, 1992. Counsel for the Commission filed her written submissions on June 17, 1992, and the reply to those submissions by counsel for the Respondents was filed with me on June 19, 1992. In the written submissions made by counsel for the Respondents on June 10, 1992, counsel submitted that a "request for a change in venue" went "hand

in hand" with one for "a publicity ban." In responding to the submissions of counsel for the Respondents, counsel for the Commission did not object to the broadening of the request to include ones for a publicity ban and for an in camera hearing, and her written submissions addressed the three issues referred to.

By way of background, and for the purpose of assisting the Board to appreciate the significance of her submissions, counsel for the Respondents reviewed the nature of the services provided by the Respondent agency. The most significant of these are the provision of "counselling, emotional support, parental relief, parenting courses, education and other resource services such as volunteer programs to help families in their time of need" and the responsibility "for providing protection and care to children whose parents are unable to care for them, and investigating reports of abuse and neglect of children up to the age of 16."

Counsel for the Respondents listed the core services provided by the Respondent agency:

- family services (investigation, assessment, treatment, prevention and support)

- children's services (placement services, legal guardianship and support for children in care)

- adoption services

- resource services (foster home services, group programs, prevention services, and court support services)

Counsel for the Respondents referred to the reliance of the Respondent agency on its annual campaign to raise money so as "to provide the means to access summer camps, arts, sports and other enrichment programs for children on [its] active case loads and children referred by social service organizations, schools, and the police."

Counsel for the Respondents submitted that in deciding the preliminary issues before me, I should examine the competing interests "that must necessarily be balanced." It was submitted that:

> [T]he board must ... balance those interests against any prejudice that might result to one or other of the parties. In this case we submit that the prejudice that would result to the respondents if the hearing were conducted in Guelph and media coverage allowed clearly outweighs the Complainant's desire to have the hearing in her home community.

The competing interests identified were: "Clearing of One's Name" and "The Greater Public Interest."

With respect to the first of these interests, counsel for the Respondents submitted that the Complainant had chosen "to publicize

her complaints about the Respondents," and that she was abetted in this decision by her husband. The individual Respondents' interests in clearing their names was said to be no less compelling than that of the Complainant in vindicating her rights. A suggested significant difference between the positions of the Complainant and the individual Respondents was said to be that the latter "continue to work with children and families in that same community. There has [sic] been no allegations by the Complainant impugning the competence, dedication, etc. of the Respondents as social workers. Consequently, any publicity that negatively impacts on the community's perception of the Respondents' as social workers is to be avoided."

The position of the individual Respondents was stated as follows:

> Notwithstanding what we would submit to be the greater interest in having their names cleared, the individual respondents are willing to put the greater interests of the Agency ahead of their own self interest. We would appeal to the complainant to do likewise.

A significant concern of the Respondent agency was said to be not only "the opportunity to 'clear its name' vis a vis its dealing with the Complainant as an employer through the board of inquiry," but to "'clear its name' with those individuals who choose not to utilize the services of the agency because of things they hear or see in the media or at the hearing itself." The Board was asked to consider what was said to be "a greater interest at stake in this matter - the community itself, and the need to ensure that children

at risk and in need of protection do indeed receive the agency's services and [are] not further placed at risk because of community person's reluctance to contact the agency based on media information about the hearing."

In dealing with the second interest identified by her: "The Greater Public Interest", counsel for the Respondents stated, under the sub-heading, "The Need for Trust & Confidence":

> The rationale for public hearings in the "home" community does not have the same impact on publicly funded employers such as the Respondent Agency for, in the end, it is not the Agency which ultimately stands to lose through public scrutiny. Rather, it is those individuals/groups of children and families who choose to forego the services of the Agency or for whom reports of abuse or neglect are withheld from the Agency because of information which has been seen or heard. It is the community that suffers, not the Agency.
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> In our respectful submission, anything which jeopardizes the trust and confidence the community has in the Agency created for the sole purpose of serving them must be avoided unless an overriding interest exists to do otherwise. Such a compelling interest does not exist in this case.
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> (Emphasis in the original.)

Counsel for the Respondents, also, under the heading "The Greater Public Interest", stated, under the sub-heading, "The Need for Funds":

> Just as negative publicity can impact on the community's willingness to use the Agency, it equally impacts on the community's willingness to contribute funds to aid in the provision of services.
>
> As indicated earlier, the Agency has an annual fund-raising campaign which goes directly to benefiting the community. The potential withholding of contributions that could result from adverse publicity, once again

> would directly hurt many vulnerable children. The community, not the Agency would suffer.

In responding to the request for a change of venue, counsel for the Commission noted that neither the Code nor the Statutory Powers Procedure Act "provide guidance as to when or whether an application for change of venue might be granted." Reference was made to the case of Younge v. Abraham (1972), unreported, where Professor Tarnopolsky, as he then was, dismissed an application for a change of venue, where the Board stated at pp.5-7:

> (i) It is clearly the purpose of the Code, and explicitly one of the duties of the Ontario Human Rights Commission to further the principle of equal opportunity without discrimination through the educational process. One of the reasons for the hearings being held in public, and one of the reasons for the holding of the of the hearings in the place the alleged act of discrimination occurred, is the educational effect such hearings have, not only on the Respondent, but in the community as well;
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> (ii) The applicant was unable to demonstrate "strong and cogent reasons" or an "overwhelming preponderance of convenience" necessary for succeeding in a request to change the venue of the hearing;
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> (iii) Although in an act of discrimination the injury to the dignity and the well-being of the Complainant must be severe beyond that which a person who has not suffered discrimination is capable of understanding fully, a Board of Inquiry must consider both the interests of the Complainant and the Respondent.

In Younge and Abraham, the hearing was convened in Sudbury and the complainant requested that the hearing be held in Toronto where she then resided because, "Sudbury was a racist city" and because she was unable to travel due to ill health. The board referred to

two Ontario practice cases, where under the then prevailing rules of practice it was necessary to demonstrate "overwhelming preponderance of convenience." The present Rules of Civil Procedure (rule 46.03)(2)) provide for a change in the place of trial where: "the court is satisfied that,

(a) the balance of convenience substantially favours the holding of the trial at another place; or

(b) it is likely that a fair trial cannot be had in the place named in the statement of claim."

Counsel for the Commission also referred to Tomkins v. Kyryliuk (1972), unreported, where Professor Krever, as he then was, dismissed the applicant's request for a change of venue from Geraldton, Ontario, where the events occurred, to Thunder Bay, Ontario, where the respondents then resided. The board noted that it was more convenient for the Commission, the board and the court reporter for the hearing to be held in Thunder Bay. However, because the allegations concerned rental property of the respondent's that was situated in Geraldton, and as most of the witnesses resided in Geraldton, the "balance of convenience" weighed in favour of holding the hearing in Geraldton. Note, especially pp.1-2.

In dealing with the request of counsel for the Respondents that there be a hearing in-camera and that there be a publicity ban, counsel for the Commission referred to section 9 of the

Statutory Powers Procedure Act, which states that:

> 1) A hearing shall be open to the public except where the tribunal is of the opinion that,
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> a) matters involving public security may be disclosed; or
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> b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
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> in which case the tribunal may hold the hearing in the absence of the public. (Statutory Powers Procedure Act R.S.O. 1980 c.484 s.9)

Counsel for the Commission also referred to Clarke v. Camelot Steak House and Tavern (1971), unreported (Ont. Bd. of Inquiry) (MacKay), where in support of an application that the proceeding be held in camera, the respondent referred to the very real possibility that there would be an adverse effect on its business as a result of the proceedings. Chairperson MacKay noted at pp.5-6:

> ... It is also true that a complaint or allegation of racial discrimination carries a moral obloquy which is more serious than a great many charges of criminal offences and an investigation under the Ontario Human Rights Code is only too likely to convey the impression that the person against whom the complaint is made is being tried as an accused. This wrong impression is given further credibility by the formal trappings and procedures which necessarily surround such an investigation. ... In short, in the public mind, appearances are very much against a respondent and unfounded allegations and testimony may cause very considerable damage to him, particularly if the allegations relate to a business or enterprise dependin upon public goodwill and acceptance. ...

further at pp.7-8 of the Camelot Steak House case, Chairperson MacKay stated:

> ... it is also of fundamental importance that hearings of allegations of racial discrimination, and other equally cruel and invidious forms of discrimination, as contemplated by the Human Rights Code, be open to public scrutiny. This has a salutary effect upon complainants and respondents alike. In addition, those in our midst who are subject to discrimination, because they are "different", are the most vulnerable and the most suspicious. It is vitally important that the public and the individual complainant see and appreciate that fairness and justice is objectively sought. And this is not achieved behind closed doors. It has been rightfully said that
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> > "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." (Ambard v. Attorney General for Trinidad and Tobago, [1936] A.C. 322, 335.)
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> The selfsame argument raised by Mr. MacKinnon was previously raised in the Ontario Court of Appeal in the case of Regina v. Tarnopolsky, Ex parte Bell Ex parte Bell (1970) 11 D.L.R. (3d) 658. Speaking for the Court, Laskin, J.A., as he then was, stated the following:
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> > " Nor can effect be given to [the] contention ... there was no warrant in the Code for a public inquiry. It is unnecessary to lay down specific rules on whether or when a board of inquiry should proceed in public. If there is any general rule applicable where the statute is silent, it is that the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them in camera."
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> The decision of the Court of Appeal was reversed by the Supreme Court of Canada on other grounds, [[1971] S.C.R. 756] but the statement was not affected by the decision of the Supreme Court. More specifically, in his monumental Inquiry into Civil Rights, The Honourable Mr. J.C. McRuer reached the same conclusion, and limited any exceptions in the following terms:
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> > "Provisions should be made that hearings should be held in public except where:
> >
> > (a) public security is involved;

(b) intimate financial or personal circumstances may have to be disclosed;
(c) hearings are by self-governing professional bodies involving professional capacity and reputation.

Where discretion is to be vested in certain tribunals to hold closed hearings in special circumstances, such should be provided in the statute conferring the power." (Royal Commission Inquiry into Civil Rights, Report 1, Volume 1, page 214)

At the hearing I adopted these statements of Mr. Justice Laskin and The Honourable Mr. McRuer and accordingly I dismissed Mr. MacKinnon's application that the proceedings be held in camera.

The recommendation made in the McRuer Report was enacted in section 9 of the Statutory Powers Procedure Act.

In Empson v. Coone, [1953] O.W.N. 925, the Court of Appeal held that a trial judge had the discretion to change the place of trial from the county in which the parties resided when the cause of action arose, regardless of the balance of convenience, if the interests of justice so required. I would not wish to render a decision on the matters before me on some narrow technical basis. I would note, however, that the distances between Kitchener and Guelph are slight and there was no suggestion that a fair hearing could not be conducted in Guelph. Notwithstanding the very able argument of counsel for the Respondents, I do not regard this as being an appropriate case for ordering a change of venue.

In Keene, Human Rights in Ontario (Carswell - 2nd Ed.) at p.330, the author states, after referring to section 9 of the

Statutory Powers Procedure Act:

> Thus far, no requests for an in camera hearing has been granted by an Ontario board, despite the fact that the only applications to date were made in cases that predated the enactment of the Statutory Powers Procedure Act.

Notwithstanding the able argument of counsel for the Respondents, I am unable to conclude that there is a sufficient basis for holding the hearing in camera. I am of the veiw that the words of Professor Mackay are still valid and that the opening of the hearing to the public continues to further the educative purposes of the Code. I have not been persuaded that the interests of the Respondent agency, those of the other Respondents, or the public interest require that I depart from the principle that the hearings be open to the public.

I am, however, mindful of the potential problems for the Respondent agency and recognize that the concerns raised on its behalf, as they relate to the need for a publicity ban are real. As long as the hearing is open to the public, and the news media is free to report on the proceedings in full once the decision of the Board has been rendered, none of the parties will be, in any way, prejudiced in the presentation of their cases, nor in achieving those purposes intended to be vindicated by a hearing. Once the decision has been rendered, the news media will be free to publish full reports of the proceeding and of the decision.

I therefore order that there be a publicity ban barring the

news media from reporting on the proceedings until the release of the Board's decision. This decision is not intended to prevent the Commission from notifying the news media that a Board of Inquiry has been appointed, the time and place of the hearing, and the nature of the complaint. See Naugler v. New Brunswick Liquor Corp. (1976), unreported (N.B. Bd. of Inquiry). Also cf. Morgan v. Toronto General Hospital (1977), unreported (Ont. Bd. of Inquiry).

During the conference call of May 15, 1992, the Complainant indicated that she did not wish the dates for the hearing to interfere with her schedule as a student in the full-time program at the Faculty of Education in Toronto. She also indicated that she would be unable to participate in a conference call to set dates for the hearing until September 16, 1992, when she expected to have adjusted any conflicts in her schedule and know on what dates she would be free to attend at the hearing. It is my intention to set up a further conference call on September 16, 1992, at 8:30 a.m., in order to set dates for the completion of the hearing in Guelph.

Dated at Toronto this day of August, 1992.

M. R. Gorsky - Board of Inquiry